No. 513

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

CANNELTON SEWER PIPE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent's brief in opposition does not deny that the issue raised by the Government's petition is one of great importance both in its tax and in its other economic aspects. Its brief is also conspicuously lacking in any effort to defend the merits of the decision below. Thus, nowhere does respondent meet the Government's contention that the instant decision, taken in conjunction with the decision in the *Merry Brothers* group of cases,[1] has denied effective meaning to the statutory limitation inherent in the words "*ordinary* treatment processes *normally* applied by mine owners or operators in order to obtain the com-

[1] *United States* v. *Merry Brothers Brick & Tile Co.*, 242 F. 2d 708, certiorari denied, 355 U.S. 824.

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mercially marketable mineral product * * *" (emphasis added). These words require, we submit, one of two conclusions: (1) that Congress proposed to limit the depletion base to certain types of processes functionally related to mining;[2] or (2) that Congress proposed to limit the depletion base by restricting the taxpayer to the most basic marketable product obtainable in the particular branch of the mining industry involved.[3] Putting aside the inequities and the economic incongruities to which respondent's view leads, we pose the question: How, as a matter of statutory interpretation, can the quoted language be read as meaning that one miner of iron ore may obtain depletion on the basis of the market value of iron ore and another on the basis of the market value of pig iron or structural steel; that one miner of salt may obtain depletion on the basis of the sales price of raw salt in bulk and another on the basis of the sales price of salt packaged for the housewife in small containers; that one miner of fire clay may obtain depletion on the basis of the market price of fire clay (widely sold in raw form) and other such miners on the basis of the sales prices of bathroom tile, sewer pipe and costly ceramics?

To this, respondent's essential reply is that this Court should not concern itself with the case because the matter is already settled by six Courts of Appeals (a threefold exaggeration), because the Court did not previously pass upon the statutory provision involved

[2] The position advanced by the Government in its petition in *Merry Brothers*.

[3] The narrower alternative urged in the instant petition.

when the Government sought certiorari in *Merry Brothers*, and because Congress could correct the situation for future years by amending the tax laws.

The legal theory advanced in the Government's present petition was argued and decided for the first time in the instant case.[4] The court below recognized this. It declared, quite correctly, that in prior cases arising under the same statutory provision "the Government's basic contention was that manufacturing processes could not be 'ordinary treatment processes' within the meaning of the Code" (Pet. App. 25);[5]

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[4] The same contention was subsequently made in *Commissioner* v. *Iowa Limestone Co.*, 269 F. 2d 398 (C.A. 8th). See Pet., p. 14, note 20.

[5] The first Court of Appeals decision in this area was the Fifth Circuit's decision in *United States* v. *Cherokee Brick & Tile Co.*, 218 F. 2d 424, in which the court, dealing with the contention that manufacturing processes are to be excluded, stated (p. 425): "There is no provision in the statute for excluding any process before such a marketable product is reached. The only restriction is that the processes must be the ordinary treatment processes normally applied by mine owners or operators."

In the *Merry Brothers* case, *supra*, the Fifth Circuit was asked to reconsider the precise issue decided in *Cherokee*. It did so and reaffirmed its *Cherokee* holding. 242 F. 2d at 710. The sole issue presented to this Court in the petition filed in *Merry Brothers* was "whether the mine owner's manufacturing operations are to be considered 'ordinary treatment processes * * *'" (Pet., No. 220, Oct. Term, 1957, p. 3).

Recently, in *Alabama By-Products Corp.* v. *Patterson*, 258 F. 2d 892, certiorari denied, 358 U.S. 930, the Fifth Circuit observed (pp. 899–900, note): "The Cherokee Brick & Tile case is not applicable. The question of whether there was a representative market price for clay at the state of processing prior to the manufacturing of the finished brick was not involved; *the issues were limited to whether the processes applied were ordinary treatment processes, and whether the finished product was a mineral product*" (emphasis added).

that the Government has not "renewed" this argument in the instant case (*ibid.*); and that the question now posed for decision is whether the concept of "commercially marketable product" established an industry-wide criterion or an individual one (Pet. App. 27–29).

Respondent claims, however, that *Merry Brothers*, in which the Court denied certiorari, actually involved the same issue as is presented here (albeit the briefs, the Court of Appeals' decision and the Government's petition were addressed solely to the question whether the term "ordinary treatment processes" includes manufacturing processes). It points out that when *Merry Brothers* was decided in the Fifth Circuit, that court concurrently disposed of twelve companion cases. Two of those cases, respondent states (Br. 8–9), involved the mining of fire clay and in both of those cases the miners had claimed depletion on the basis of finished products made from fire clay. This indicates, to be sure, that the Government might have raised in those cases, as an alternative ground for reversal, the issue which it later raised in the instant case. It does not indicate that the Government did raise the issue (in fact, it did not) or that the issue was considered or decided in the Court of Appeals (in fact, as the Court of Appeals' opinion in *Merry Brothers* makes clear, it was not).

The Government's position in this area of litigation has been neither devious nor complex. In the litigation which preceded the instant case, the Commissioner rested upon the broad contention that the statute should be interpreted to restrict the depletion

base to *mining* processes as distinguished from manufacturing processes. If that contention had been accepted by the courts, the instant problem would be relatively inconsequential. When the Government failed, in the first series of cases, to persuade the lower federal courts of the correctness of that broad contention, and when it found itself confronted with rapidly expanding claims by taxpayers that they were entitled to include manufacturing processes utilized to produce highly processed, expensive finished products, it answered as follows: Granting that taxpayers have been held entitled to include in the depletion base all processes, whether mining or manufacturing, necessary to obtain the commercially marketable product, taxpayers are nonetheless restricted to the basic marketable product made in the relevant branch of the mining industry. Respondent seems to be saying that the Government, having lost on its broad theory in one group of cases, is barred from urging a different and narrower theory in subsequent cases if it might have found a way to present both theories alternatively in the first instance. This is indeed novel doctrine. If, as is argued in the petition for certiorari, the decision below wholly distorts the statutory provisions dealing with tax depletion for mining and would result in losses to the revenue of more than a half-billion dollars annually, the need for review by this Court is in nowise obviated by the circumstance that the question here presented was not presented earlier.

Respondent also suggests that, however unsound the result reached below and however important the

issue, there is no real need for review because Congress can change the relevant tax provision. This overlooks, to begin with, the hundreds of cases, both pending and potential, involving past years and the current tax year.[6] More important, it ignores the consideration that the legal issue presented is one of statutory interpretation—a judicial issue. Respondent's approach seems to be based on the premise that the more important an issue of statutory interpretation, the less occasion there is for an exercise of certiorari jurisdiction because the more appropriate it is that Congress, not this Court, should resolve the issue. This is to state in reverse the governing criteria. Carried to its logical conclusion, this would mean that this Court should review only the less important questions of statutory construction and decline judicial issues which are of pressing national concern.

[6] The amount of revenue involved for this period may aggregate close to a billion dollars. See Appendix to the Petition, Tables 1 and 2, pp. 39–40.

CONCLUSION

For the reasons set forth in the petition and the additional reasons noted above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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